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6 KATHRYN WORKMAN, on behalf of  
7 herself and all others similarly situated,

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10 No. C 15-02568 WHA

11 Plaintiff,

12 v.

13 PLUM INC., D/B/A/ PLUM ORGANICS,

14 ORDER RE MOTION  
15 TO DISMISS

16 Defendant.

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17 INTRODUCTION

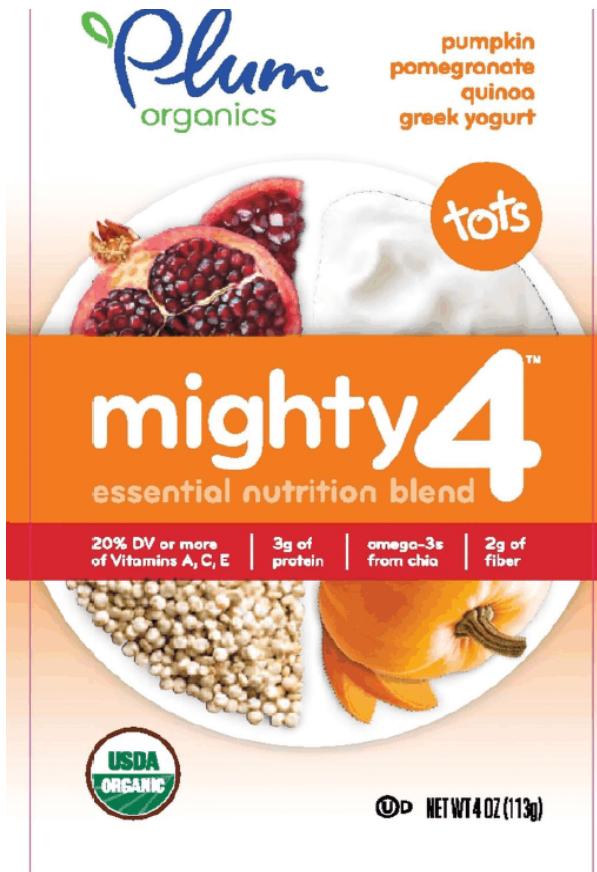
18 In this food-labeling challenge, defendant food manufacturer moves to dismiss for failure  
19 to state a claim. To the extent stated herein, defendant's motion is **GRANTED**.

20 STATEMENT

21 Plaintiff Kathryn Workman purchased several varieties of defendant Plum's Organics  
22 Mighty 4 puree pouches and fruit bars in 2014 and 2015. Each Mighty 4 product at issue in our  
23 case consists of a puree pouch of blended ingredients or fruit bars marketed for consumption by  
24 toddlers. In purchasing the products, plaintiff read, relied on, and was allegedly deceived by the  
25 labeling and advertising displayed on the front packaging, namely the pictures of the ingredients  
26 on the principal display panel. Each label at issue showed a picture containing ingredients from  
27 four different food groups. For example one flavor of puree pouch depicted pumpkin,  
28 pomegranate, quinoa, and yogurt, as shown below (Defendant's RJD; Exh. 1):

## United States District Court

For the Northern District of California



These ingredients, however, were not the only items contained in the puree pouches and fruit bars. In fact, the most prominent ingredients in most of the products were apple, pear, or banana puree. As required by the FDA, the products contained a “Nutrition Facts” panel, listing all ingredients in descending order of predominance.

Essentially, plaintiff claims that the products’ front packaging conveyed that the contents were largely made up of the pictured ingredients (such as pumpkin, pomegranate, quinoa, and yogurt), when, in fact, these were not the most prominent ingredients. Thus, plaintiff argues, these deceptive labels violated the California Consumer Legal Remedies Act Section 1750 and the California Business and Professions Code Section 17200.

Now, defendant moves to dismiss for (1) failure to state a claim under Rule 12(b)(6), (2) lack of standing, and (3) failure to plead with sufficient particularity under Rule 9. This order follows full briefing and oral argument.

## 1 ANALYSIS

2 **1. MOTION TO DISMISS UNDER RULE 12(b)(6).**

3 To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
4 accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S.  
5 662, 663 (2009). While a court deciding a motion to dismiss must take a complaint's well-  
6 pleaded factual allegations as true, it also must determine, relying on its "judicial experience and  
7 common sense," whether those allegations amount to a "plausible" claim. *Id.* at 664.

8 In our case, plaintiff's claims for relief are governed by the reasonable consumer test.  
9 Under this standard, a plaintiff must show that "members of the public are likely to be deceived"  
10 by the product at issue. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). The California  
11 Supreme Court has recognized "that these laws prohibit not only advertising which is false, but  
12 also advertising which, although true, is either actually misleading or which has the capacity,  
13 likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar*, 39 Cal.3d 609, 626  
14 (1985).

15 Here, plaintiff has not met *Iqbal*'s plausibility requirement. After carefully reviewing the  
16 labels at issue, this order finds that a reasonable consumer would not be deceived by them.  
17 Plaintiff concedes that the labels contain no affirmative misrepresentations and that all of the  
18 items pictured are actually present in the product. In contrast to plaintiff's assertions, a  
19 reasonable consumer would simply not view pictures on the packaging of a puree pouch or box of  
20 fruit bars and assume that the size of the items pictured directly correlated with their  
21 predominance in the blend. One can hardly walk down the aisles of a supermarket without  
22 viewing large pictures depicting vegetable or fruit flavors, when the products themselves are  
23 largely made up of a different base ingredient. Every reasonable shopper knows that the devil is  
24 in the details. Moreover, any potential ambiguity could be resolved by the back panel of the  
25 products, which listed all ingredients in order of predominance, as required by the FDA. As our  
26 court of appeals stated in this context, "reasonable consumers expect that the ingredient list  
27 contains more detailed information about the product that confirms other representations on the  
28 packaging." *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

1       While our court of appeals has never addressed the issue of true but allegedly deceptive  
2 pictures on food labels under the CLRA, this order agrees with the numerous decisions that have  
3 dismissed similar food labeling claims at the pleading stage. Where some plaintiffs alleged  
4 deceptive advertising in the sale of crackers where the packaging read: “made with real  
5 vegetables,” the district court rejected that claim. *Red v. Kraft*, No. 10-1028, 2012 WL 5504011,  
6 at \*3 (C.D. Cal. Oct. 25, 2012) (Judge George Wu). *Red* held that “plaintiffs’ theory of the case  
7 is that the packaging suggests the product is healthy and contains a significant amount of  
8 vegetables because the packaging boasts that the crackers are made with real vegetables and  
9 depicts vegetables. The fact remains that the product is a box of crackers, and a reasonable  
10 consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh  
11 vegetables.” *Ibid.*

12       Where a plaintiff alleged that a package of dip labeled with the statement, “with garden  
13 vegetables” had been misleading because it would likely to deceive a reasonable consumer, the  
14 district court rejected that claim. *Henderson v. Gruma Corporation*, No. 10-4173, 2011 WL  
15 1362188, at \*1 (C.D. Cal. Apr. 11, 2011) (Judge Howard Matz). *Henderson* held that a product  
16 that contained avocado powder, dehydrated onion, garlic powder, and bell pepper would be  
17 unlikely to deceive a reasonable consumer because the product “does in fact contain vegetables  
18 that can be grown in a garden.” *Id.* at \*12. While *Henderson* declined to dismiss the plaintiff’s  
19 claim related to the large “guacamole” label and pictures of avocados, that was because the  
20 product itself did not actually constitute guacamole.

21       Here, plaintiff’s claim fails at the threshold. The products at issue do not display any  
22 affirmative misrepresentations. They merely show pictures of featured ingredients contained in  
23 the puree pouch and fruit bars. No reasonable consumer would expect the size of the flavors  
24 pictured on the label to directly correlate with the predominance of the pictured ingredient in the  
25 puree blend.

26       In opposition, plaintiff largely relies on our court of appeals’ decision in *Williams*, cited  
27 above, which stated that “California courts . . . have recognized that whether a business practice is  
28 deceptive will usually be a question of fact not appropriate for decision on demurrer” and further

1 stated that motions to dismiss on the grounds that a reasonable consumer could not plausibly have  
2 been deceived should only be granted in “rare situations.” *Williams*, 552 F.3d at 938–39.  
3 Moreover, *Williams* declared: “We do not think that the FDA requires an ingredient list so that  
4 manufacturers can mislead consumers and then rely on the ingredient list to correct those  
5 misinterpretations and provide a shield for liability for the deception.” *Ibid.*

6 That decision, however, is materially distinguishable from our case. *Williams* involved  
7 fruit snacks packaging displaying pictures of several fruits. There, our court of appeals found  
8 three potentially deceptive aspects of the defendant’s label:

9 The product is called “fruit juice snacks” and the packaging  
10 pictures a number of different fruits, potentially suggesting  
11 (falsely) that those fruits or their juices are contained in the  
12 product. Further, the statement that Fruit Juice Snacks was made  
13 with “fruit juice and other all natural ingredients” could easily be  
14 interpreted by consumers as a claim that all the ingredients in the  
product were natural, which appears to be false. And finally, the  
claim that Snacks is “just one of a variety of nutritious Gerber  
Graduates foods and juices that have been specifically designed to  
help toddlers grow up strong and healthy” adds to the potential  
deception.

15 *Ibid.* As an initial matter, *Williams* issued shortly before the Supreme Court significantly  
16 changed the Rule 12 pleading standards in *Iqbal*, cited above. Furthermore, our court of appeals’  
17 main reservations about the deceptiveness of the fruit juice snacks label related to its  
18 affirmatively false statements. There, the display panel showed pictures of many fruits not  
19 actually contained in the product. In addition, the label stated that the snacks were made with  
20 “other all natural ingredients” when, in fact, many of the ingredients happened to be unnatural.  
21 Based on this language, the undersigned judge held in a previous decision involving the true  
22 statement “made with real fruit,” that *Williams*’ applicability was limited to affirmative  
23 misrepresentations: “Plaintiff’s reliance on *Williams v. Gerber* is inapposite because that action  
24 involved an affirmative misrepresentation. The packaging of the ‘fruit juice snacks’ in *Williams*  
25 contained pictures of different fruits not actually contained in the product.” *Manchouck v.*  
26 *Modelez Int’l Inc.*, No. 13–02148, 2013 WL 5400285 (N.D. Cal. Sept 26, 2013) at \*3. This order  
27 stands by that previous ruling. Here, in contrast to *Williams*, the packaging at issue contained no  
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1 affirmative misrepresentations and the pictures were simply not likely to mislead a reasonable  
2 consumer.

3 *Williams*' final beef with the fruit juice snacks involved the "nutritious" statement, quoted  
4 above. In a footnote, however, *Williams* qualified this assertion, stating that the "claim that  
5 Snacks is 'nutritious,' were it standing on its own, could arguably constitute puffery, since  
6 nutritiousness can be difficult to measure concretely. . . . This statement certainly contributes,  
7 however, to the deceptive context of the packaging as a whole." *Williams*, 552 F.3d at 939 at n.  
8 3. Therefore, any puffery-like statements (or pictures) on the Mighty 4 label, standing alone,  
9 would not rise to the level of being deceptive.

10 Other than relying on *Williams*, plaintiff's opposition and complaint merely reiterate that  
11 the pictures displaying "a heaping mound of greek yogurt," "a mound of quinoa," and "plenteous  
12 quantities of pumpkin" would lead a reasonable consumer to believe that those ingredients were  
13 the primary ingredients in the puree pouch or fruit bar (Compl. ¶¶ 16–19). In addition, at oral  
14 argument, plaintiff asserted that the packaging would mislead a reasonable consumer because it  
15 did not display pictures of applesauce (the primary ingredient in many of the products). For the  
16 reasons stated above, these allegations are insufficient.

17 Defendant also moves to dismiss based on plaintiff's alleged lack of standing and  
18 plaintiff's failure to plead with sufficient particularity under Rule 9. Because this order finds that  
19 plaintiff has failed to state a claim under Rule 12(b)(6), it need not address those arguments.

20 **2. JUDICIAL NOTICE.**

21 Defendant requests judicial notice of the eleven product labels at issue in our case  
22 (Defendant Exhs. 1–11). Plaintiff does not oppose. Defendant's requests for judicial notice are  
23 **GRANTED**, as the contents of these documents are "not subject to reasonable dispute," and are  
24 incorporated into the complaint by reference. FRE 201.

25 **CONCLUSION**

26 To the extent stated herein, defendant's motion to dismiss is **GRANTED**. Appended to her  
27 opposition, plaintiff submitted a proposed amended complaint, the only substantive change being  
28 that plaintiff seeks money damages for the CLRA claim. At oral argument, plaintiff also stated

1 that amendment should be allowed because defendant had recently issued a press release  
2 indicating that it would be changing its product labeling. Defendant's press release is irrelevant  
3 to the legal issue presented here. Moreover, as this order finds that the labels at issue are not  
4 deceptive, and the labels themselves cannot be changed by a new complaint, any amendment  
5 would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, leave to amend is  
6 **DENIED**. Judgment will be entered separately.

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8 **IT IS SO ORDERED.**

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10 Dated: November 2, 2015.

11   
12 WILLIAM ALSUP  
13 UNITED STATES DISTRICT JUDGE  
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